

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

ALFONSO PIZZA

v.

UNITED STATES OF AMERICA

CRIMINAL NO. 95-671-01

CIVIL NO. 99-2089

M E M O R A N D U M

BRODERICK, J.

DECEMBER , 1999

Presently before this Court is pro se Petitioner Alfonso Pizza's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, the Government's response thereto, and Petitioner's reply. For the reasons that follow, this Court concludes that Petitioner's motion should be denied.

On August 15, 1996, following a trial by jury, Petitioner was convicted of violating 18 U.S.C. § 922(g)(1), possession of a firearm by a convicted felon. This Court sentenced Petitioner to 180 months imprisonment and five years of supervised release on April 16, 1997. Petitioner's conviction was affirmed by the Third Circuit Court of Appeals on January 15, 1998. Thereafter, on May 4, 1998, the Supreme Court denied Petitioner's writ of certiorari.

Petitioner filed the instant motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 on April 26, 1999. Petitioner makes the following claims: (1) his conviction was

obtained by the unconstitutional failure of the Prosecution to disclose favorable evidence, (2) the Court erred during trial in denying Petitioner's motion for a writ of habeas corpus ad testificandum requiring production of a federal prisoner, and (3) ineffective assistance of both trial and sentencing counsel. This Court must construe Pizza's pro se petition liberally, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and must also accept Petitioner's factual allegations as true, Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). However, because it is clear that Petitioner is not entitled to relief based upon any of these claims, this Court finds that an evidentiary hearing is not warranted and that Petitioner's claims should be summarily dismissed. U.S. v. Day, 969 F.2d 39, 41 (3d Cir. 1992). The Court will now address each claim in turn.

Petitioner first alleges that the prosecution held back a "new directive describing the arresting powers of the F.B.I." during a hearing conducted by this Court to determine whether two firearms seized at the time of Petitioner's arrest should be suppressed. In his motion, Petitioner never elaborates on what he means by this so-called "new directive." In any event, this claim is no more than an attempt by Petitioner to revisit the suppression issue, which has been raised by Petitioner, and considered and rejected three times by this Court- once at the suppression hearing held on August 12, 1996, again as a Rule 29

motion and again through Petitioner's post-verdict motion asking for reconsideration of the suppression issue.

Even assuming the existence of some "new directive" possessed by the government and not disclosed, Petitioner has failed to give any reasons as to how such a document would have made his arrest illegal. Neither the opinion of this Court which denied Petitioner's motion to suppress evidence of the two handguns because of an unlawful arrest, nor the opinion of the Third Circuit, which affirmed Petitioner's conviction holding that the arrest of Petitioner by two federal agents was lawful, was based upon any directive of the FBI. Both the opinion of this Court and the opinion of the Third Circuit concluded that the arrest of Petitioner was lawful because the FBI agents were considered "peace officers" under Pennsylvania law and as such were vested with the authority to make arrests. Therefore, even assuming the existence of an exculpatory directive, Petitioner cannot show that the result of his trial would have been different had such evidence been disclosed. Furthermore, because the suppression issue was raised and considered on direct appeal, Petitioner may not use a section 2255 motion as a vehicle to relitigate this claim. See U.S. v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993). Petitioner's first claim is thus without merit.

Petitioner next claims that this Court erred in denying Petitioner's motion for a writ of habeas corpus ad testificandum

requiring the production of Sergio Battaglia, a proffered defense witness who, at the time of Petitioner's trial, was serving a sentence in a federal prison. Petitioner alleges that this witness could have testified to the reputation of Special Agent Kelly of the Pennsylvania Attorney General's Office for planting evidence. Special Agent Kelly accompanied the FBI agents who arrested Petitioner. In an in camera hearing held in chambers during the trial to address Petitioner's motion, Petitioner offered the following to the Court with regard to a conversation he claimed to have had with the proffered witness:

You know, I didn't pull Sergio Battaglia's name out of a hat. He never known [sic] me either. But as we are talking, we were in each others company twice, he never said specific, Kelly did this to so and so, he never said --he said you've got to watch Kelly, he'll set you up, and rambled on and on and on. He said this on such a day, he knows Kelly, works with him, Kelly is a little shady whatever. . .

In denying Petitioner's motion, this Court concluded that Battaglia's presence was neither necessary nor material to Petitioner's defense, since the testimony quoted above clearly showed that Battaglia had no personal knowledge concerning the conduct of Special Agent Kelly in connection with Petitioner's arrest. The evidence at trial showed that the arrest and search of Petitioner was conducted by the two FBI agents. The Court therefore determined that the proffered testimony of Battaglia was not relevant or significant and in no way could have affected

the outcome at trial. Moreover, the Court concluded that the proffered evidence would have been inadmissible character evidence pursuant to Rule 608 of the Federal Rules of Evidence. The Court also concluded that under Rule 403 any value the testimony might have had was substantially outweighed by the danger of unfair prejudice to the Government.

In United States v. Cruz-Jiminez, 977 F.2d 95, (3d Cir. 1992), the Third Circuit held that the defendant carries the burden of proving the necessity of the proposed witness's testimony. "A defendant's failure to carry this burden is a legitimate basis to deny a request to procure the presence of a witness." The Third Circuit continued, "Not every remotely relevant proffer will require the issuance of process to bring an incarcerated witness before the court. If the witness's testimony is only peripherally relevant, cumulative or otherwise insignificant, or if the other evidence against the defendant is so overwhelming that the proffered testimony could not affect the outcome, the proffered testimony is not material and issuance of the writ is not required." Id. at 100. This Court properly denied Petitioner's motion for a writ of habeas corpus ad testificandum in connection with Sergio Battaglia. Petitioner's claim that the Court erred in this regard is therefore without merit.

Finally, Defendant claims that he was denied his Sixth

Amendment right to effective assistance of counsel both at trial and at sentencing. Petitioner makes several claims with regard to his trial counsel, Robert O'Shea, Jr., Esq. Namely, he claims that counsel failed to call witnesses who could have testified that evidence was planted on him; that counsel failed to ask for a polygraph test; that counsel failed to have the firearms which were the subject of Petitioner's indictment tested for fingerprints; and that counsel failed to have the firearms examined by an independent firearms expert to determine whether they were operable.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court formulated the standard that must be met to prevail on an ineffective assistance of counsel claim. Defendant must first show that counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel guaranteed the defendant by the Sixth Amendment.'" Id. at 687. Second, Petitioner must show that this deficient performance prejudiced his defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Petitioner's ineffective assistance claims with respect to his trial counsel must fail. Petitioner has not and indeed cannot show that counsel's performance was deficient. Mr. O'Shea

was the second counsel appointed by this Court to represent Petitioner. Mr. O'Shea was appointed after Petitioner, on the eve of trial, expressed his dissatisfaction with his first appointed trial counsel. Almost immediately after the appointment of Mr. O'Shea, Petitioner informed the Court that he was dissatisfied with Mr. O'Shea, without giving any justifiable reason for his dissatisfaction. In response to Petitioner's numerous requests for new counsel, this Court noted that Mr. O'Shea had done "an outstanding job." The fact that counsel may not have pursued every area Petitioner desired him to pursue does not show that counsel's representation of Petitioner fell below the objective standard of reasonableness required to establish an ineffective assistance claim under Strickland. Id at 688. Furthermore, Petitioner fails to assert any prejudice resulting from his claimed ineffective assistance of trial counsel. His ineffective assistance claim with respect to his trial counsel is therefore without merit.

Petitioner's claim of ineffective assistance of counsel at sentencing is similarly without merit. On November 8, 1996, the Court, again at the request of Petitioner, appointed new counsel Elizabeth Ainslie, Esq., to represent Petitioner at sentencing after Petitioner informed the Court that he did not want Mr. O'Shea to continue to represent him. And once again, Petitioner claims that his third appointed counsel, Ms. Ainslie, failed to

provide him with effective assistance of counsel in that Ms. Ainslie failed to object to alleged inaccuracies in his Pre-Sentencing Report, that she did not obtain pertinent medical records, and that she failed to raise the issue of Petitioner being assaulted during his arrest.

At Petitioner's sentencing, this Court calculated the Guideline range for Petitioner's imprisonment to be 235 to 293 months. The Court however granted Ms. Ainslie's motion for a downward departure from the applicable sentencing guideline range of imprisonment due to the fact that defendant's criminal history category over-represented the seriousness of both his criminal history and the likelihood that he would commit further crimes. The Court then sentenced Petitioner to the statutory minimum term of 180 months imprisonment, as proscribed in 18 U.S.C. § 924(e). The Court had no discretion to sentence Petitioner to a lesser term. As Petitioner received the shortest term of imprisonment he could have received under the statute, his claim that he was denied effective assistance of counsel at sentencing is totally without merit. In any event, even assuming arguendo that Petitioner's representation at sentencing was somehow below the objective standard of reasonableness set forth in Strickland, Petitioner cannot assert any resulting prejudice, as he was sentenced to the statutorily mandated minimum for his offense.

Accordingly, Petitioner's motion to vacate, set aside or

correct sentence pursuant to 28 U.S.C. § 2255 is denied. The Court will also deny Petitioner a certificate of appealability. Under 28 U.S.C. § 2253(c)(1)(B), to appeal a final order in a habeas corpus proceeding pursuant to section 2255, the petitioner must first obtain a certificate of appealability. This certificate of appealability may be issued by a district court judge. See United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has determined that Petitioner has failed to demonstrate that he was deprived of any constitutional right. Therefore, Petitioner will not be granted leave to appeal this decision. An appropriate Order follows.

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O R D E R

AND NOW, this day of December, 1999; upon consideration of Petitioner Alfonso Pizza's Motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, Government's response thereto, and Petitioner's reply; for the reasons stated in this Court's accompanying memorandum of this date;

IT IS ORDERED: Petitioner Pizza's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255 is **DENIED**;

It is further **ORDERED** that Petitioner's Motion for Appointment of Counsel is **DISMISSED** as **MOOT**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

Raymond J. Broderick, J.